88-1298

Supreme Court, U.S.
FILED
FEB 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

THE STATE OF MICHIGAN,

Petitioner

vs.

ELBERT BOYD,

Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF THE STATE OF MICHIGAN

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County of Wayne

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QUESTION PRESENTED

GIVEN THE HOLDING IN COLORADO v CONNELLY, 479 US ___; 107 S Ct 515; 93 L Ed 2d 473 (1986) THAT THE MERE INTRODUCTION EVIDENCE AT A STATE CRIMINAL TRIAL DOES NOT CONSTITUTE "STATE ACTION" WITHIN IN THE MEANING OF THE FOURTEENTH AMENDMENT, SHOULD THIS COURT INTERVENE TO RESOLVE A SPLIT AMONG EXISTING AUTHORITIES AS TO WHETHER DUE PROCESS REQUIRES THE SUPPRESSION OF A WITNESS' IDENTIFICATION TESTIMONY THAT IS THE PRODUCT OF AN EARLIER SUGGESTIVE CONFRONTATION, WHICH IS MADE SUGGESTIVE BY THE ACTS OF A PRIVATE PARTY IN THE ABSENCE OF ANY GOVERNMENTAL ACTION IN ORCHESTRATING THE CONFRONTATION?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

THE STATE OF MICHIGAN,

Petitioner

vs.

ELBERT BOYD,

Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF THE STATE OF MICHIGAN

NOW COME the People of the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Chief of the Criminal Division, Research, Training and Appeals, and Jeffrey Caminsky, Assistant Prosecuting Attorney, and pray that a

writ of certiorari issue to review the judgment of the Michigan Court of Appeals, entered in this cause on March 23, 1988, rehearing denied August 3, 1988, leave to appeal denied by the Michigan Supreme Court on December 19, 1988, three Justices dissenting.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported, and is appended below as Appendix C; the order of the Michigan Court of Appeals is unreported, and is appended below as Appendix D; the order of the Michigan Supreme Court denying leave to appeal is unreported as yet, and appended below as Appendix E.

STATEMENT OF JURISDICTION

The Michigan Court of Appeals entered judgment on August 3, 1988. The Michigan Supreme Court entered judgment on December 15, 1988. This Court's jurisdiction is invoked under 28 USC Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall...be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law...."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdictions the equal protection of the laws."

STATEMENT OF THE CASE

Following reversal of his first-degree murder conviction on grounds of newly discovered evidence, Respondent moved in the trial court for suppression of the identification testimony of one Clinton Woods. At the hearing to support his motion, Elwood Gunderson, the officer in charge of the investigation, testified that he had taken steps to ensure Wood's presence at the preliminary examination in this matter, in case the prosecutor

felt the need for his testimony, but that he had taken care that Woods not be admitted into the courtroom, since most witnesses are "routinely sequestered," and that unless directed to do otherwise by the judge, he generally tells the waiting witnesses "to wait in the hallway." Woods' anticipated testimony concerned the events in question, and he was not expected to provide any evidence identifying Defendant as the shooter.

Clinton Woods testified that while he did not actually testify until trial, he had attended some prior proceedings at the direction of the police. At one such proceeding, he had ridden to court with the parents of the deceased, but had talked to no other court personnel. At some point during the proceedings, while he was seated in the hallway, one of the other witnesses pointed Respondent out

through a window leading into the courtroom; after seeing him, Woods approached Gunderson and indicated that he (Woods) could identify Respondent as the shooter. This was the second time Woods remembered seeing Respondent; the first time was during the shooting.

Upon learning of the new development, Gunderson informed the prosecutor and defense counsel. Woods identified Respondent at trial, and his testimony helped convict him of first-degree murder.

Following an earlier evidentiary hearing, on August 26, 1986 the trial court entertained a defense motion to suppress Woods' identification testimony. Ruling that the police were negligent in failing to keep Woods apart from other witnesses in the case, and that they had

failed to protect Respondent from the danger of a suggestive identification by utilizing "circumstances that the law has determined [are] fairer such as a line-up or photographic show-up,..." the trial court ordered Woods' identification testimony suppressed.

The prosecution took an interlocutory appeal, and on March 23, 1988, the Michigan Court of Appeals affirmed the trial court's ruling, denying rehearing on August 3, 1988. On December 19, 1988, the Michigan Supreme Court denied the prosecution's application for leave to appeal. The case is now before the Court on a Petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

Simply put, this case presents the Court with the chance to consider applying the underlying policy of Colorado v Connelly, 479 US ___; 107 S Ct 515; 93 L Ed 2d 473 (1986) -- holding that the mere act of introducing evidence in court does not constitute sufficient "state action" to make the evidence challengable under the Due Process Clause of the Fourteenth Amendment -- in the context of identification testimony.

The facts of this case are simple: while waiting in a hallway outside the courtroom, one witness pointed Respondent out to another witness, through a hallway window -- leading to the discovery that the second witness could identify Respondent as the shooter. Clearly, had

police done as the first witness did, the trial court could properly suppress the courtroom identification evidence, for it is well established that police identification procedures which are so "suggestive and conducive to irreparable mistaken identification" violate due process of law. Stovall v Denno, 388 US 293, 302; 87 S Ct 1967; 18 L Ed 2d 1199 (1967). However, the fact that it was the act of a private person, rather than the police, which gave rise to the suggestiveness of the confrontation presents a new question of law -- one which this Court has never addressed, and to which existing law provides conflicting answers: while the Sixth and Ninth Federal Circuits have apparently adopted the reasoning of the state courts in this case, Thigpen v Cory, 804 F2d 893

(CA 6, 1986); Green v Loggins, 614 F2d 219 (CA 9, 1980), other circuits appear to disagree. United States v Massaro, 544 F2d 547 (CA 1, 1977); United States v Colcolough, 549 F2d 937 (CA 4, 1977); United States v Davis, 487 F2d 112 (CA 5, 1973); United States v Neverson, 463 F2d 1224 (CA DC, 1972). See also, Ross v State, 734 P2d 321 (Okl Cr, 1988) and People v Moore, 133 Misc 2d 900; 509 NYS2d 259 (1986). Thus, the state of the law in this area is at once unclear, and ripe for this Court's resolution.

Therefore, Petitioner request that this Court grant certiorari to resolve what the dissenting State court justices described as "the issue of jurisprudential significance in this case" -- ie, whether the concept of due process of law permits the acts of private parties to serve as the basis for

suppressing otherwise probative evidence of guilt in a state criminal trial.[1]

---

[1] To forestall two minor objections Respondent may proffer to this Court's jurisdiction, Petitioner reminds the Court that as a trial court acquittal would render the federal issue in this matter moot, this Court does have the jurisdiction to entertain this cause, South Dakota v Neville, 459 US 553; 103 S Ct 916; 74 L Ed 2d 748 (1983). In addition, while the state Court of Appeals cites exclusively Michigan authority, those authorities in turn rely upon Federal law, People v Kachar, 400 Mich 78, 90-97; 252 NW2d 807 (1977); People v Petrella, 124 Mich App 754, 755-756; 336 NW2d 761 (1983) affd oth grds 424 Mich 221; 380 NW2d 11 (1985); as this Court need not parse through state law to determine the extent to which Federal law is the deciding factor in a state court opinion, such an occurrence does not bar this Court's consideration of the instant case. Michigan v Long, 463 US 1032, 1040-1042; 103 S Ct 3469; 77 L Ed 2d 1201 (1983); Oregon v Haas, 420 US 714; 95 S Ct 1215; 43 L Ed 2d 570 (1975).

Of course, such concerns do not require the Court to consider this case, either. But then, that is quite beside the point.

CONCLUSION

WHEREFORE, Petitioner prays that this Court grant plenary review, reverse the holding of the State court, and remand the cause for proceedings consistent with this Court's opinion.

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Dated: January 3, 1989

JC/mlw

APPENDIX

TRIAL COURT ORDER SUPPRESSING EVIDENCE

STATE OF MICHIGAN
IN THE RECORDER'S COURT
FOR THE CITY OF DETROIT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs

No. 84-05093

ELBERT BOYD,

Defendant.

ORDER OF THE COURT

At a session of said Court, held in the City of Detroit, Wayne County, Michigan on August 26, 1988.

PRESENT: HON. DAVID P. KERWIN
Recorder's Court Judge

A motion to suppress In Ct ID of Def [sic] by Clinton Woods having been filed; both sides having been heard; and the Court being fully advised in the premises;

IT IS THEREFORE ORDERED AND ADJUDGED that the Motion to ___ [sic] be, and the same hereby is, granted, for reasons stated on the record.

/s/ David P. Kerwin
Recorders Court Judge

EXTRACT FROM RECORDER'S COURT RECORD

* * *

THE COURT: Okay. I believe that there's more to it than merely whether or not there was a deliberate attempt made on the part of the police to create or to stage a confrontation for Mr. Woods and, quite frankly, if we were to make analysis based strictly on police misconduct in dealing with the issues of in-Court identifications, then we would be doing a great disservice to that which is the underlying basis of all the focus on identification problems and whether or not they should be permitted.

And the threshold question and one that really goes beyond whether or not there was a staged confrontation as most

of the case law and Michigan appellate Courts deal with is whether there's an independent basis or not.

Obviously, it makes it all the more compelling where there's a staged confrontation and the police department is shown to have made an effort to create a confrontation for a witness skirt the kinds of requirements that the law imposes in terms of providing to the best of our ability the most error-free kind of circumstance for a witness to view a possible perpetrator.

And the issue of identification testimony is one that has caused a good deal of writing both by the appellate Courts in this nation as well as law professors and others within the academic community of the vagaries of the

identification process and the strong possibility of misidentification.

And the main thrust of concern is that people should not be convicted on the basis of a misidentification.

And it becomes all the more difficult because as time goes on with each additional confrontation, the initial identification becomes cemented in the mind of the individual; not with malice necessarily; not with deliberate design to misidentify and more often than not out of sincere belief that the person they're identifying is indeed the person who is the perpetrator.

And People versus Metcalf found at 37 -- or 65 Michigan Appeals, page 37, the Court at page forty-four indicated

that there were a number of factors to review the prosecutor's independent basis claim.

And they list those as witness's prior opportunity to observe the defendant during the crime; the existence of any discrepancy between any pretrial description and the defendant's actual appearance; and identification of another person prior to the improper identification procedure; and the failure to identify the defendant on a prior occasion as well as any identification of the defendant at a proper identification prior to the improper one and the lapse of time between the crime and the improper identification procedure.

And the Court goes on to state, quote, we agree that those factors are

good ones to use to review this type of claims for admissibility of the in-Court identification.

And this case is one where in order to really be fair with respect to the issue of whether there's an independent basis for in-Court identification, you have to look at the totality of the circumstances and you have to take all of the testimony that has been offered on this issue concerning Mr. Woods' identification in Court.

And, quite frankly, at the first trial when this issue was raised, there were areas that were not covered because of -- not intentional but I believe an incorrect characterization and lack of labeling of what Mr. Woods prior confrontation had been by Mr. Woods himself.

He didn't know, quite frankly, where it was that he was when he saw Mr. Boyd.

And it was only during the testimony at the last evidentiary hearing that the prior confrontations became clearer to this Court in terms of where it was and under what circumstances he saw Mr. Boyd.

And it also became clear to this Court that Mr. Woods was in this Court's opinion, if not deliberately influenced by the family of the deceased, then certainly inadvertently influenced by them.

And the officer in charge had not staged the confrontation but he also had taken no steps to isolate his witnesses as to prevent an inadvertent

confrontation such as the ones that had occurred in this case.

And the burden must remain with the People to establish there was an independent basis.

And the police as their investigators had the obligation, particularly when the crime is that of murder in the first degree and one so serious and one that by the officer's own testimony was dependent on an eye-witness identification.

But the attitude is perhaps best revealed by the testimony of Sergeant Gunderson when he quite candidly believed and stated on the record at that time he didn't really care much about Mr. Woods' testimony because that was icing on the

cake as far as he was concerned and rather incidental.

He believed he had the right perpetrator based on the testimony of Robert Wheatley and, consequently, he didn't pay much attention to what Mr. Woods had to offer in that regard.

And Mr. Woods was left to his own devices insofar as remaining outside the Courtroom -- insofar as being isolated from any inadvertent confrontation with the defendant prior to coming into Court.

And there's no question -- it is clear and convincing in this Court's mind that his in-Court identification at the time of the trial was based not on his viewing of the crime as it occurred but rather on the basis of his confrontation

in Juvenile Court or at the preliminary examination as well as the fact -- and it cannot be ignored -- that he rode down to Court with the family of the deceased; talked about what he saw -- the things that he saw.

The family of the deceased, Mr. Gleeton particularly, is absolutely convinced on the basis of Mr. Wheatley's testimony that the police had the right person.

In fact, when this Court called him to advise him that we were going to be re-opening this case on the basis of newly discovered evidence, his cynicism was such and his belief was such, he indicated to this Court he thought those new witnesses were bought and paid for.

The family of the deceased is not the party that ought to be bringing eye-witness identifiers to Court and leaving them in the company of these witnesses and not having any kind of protection whatsoever for the defendant from inadvertent confrontations; that leave the trier of fact without the ability to -- if those identifications are even going to be admissible -- to be aware of what the circumstances of prior contact were or be able to have a judicial determination prior to the trial that delves into whether there's an independent basis that is within the context of all the testimony as opposed to just that which is assumed by the parties and, yet, never really flushed out.

The Court notes in making its ruling

this morning that the factors that are listed in Metcalf refer back to People versus Hutton at 21 Michigan Appeals 312 which creates a composite that, as I said earlier, within the totality of the circumstances leave this Court to feel, quite frankly, beyond any doubt that there's no independent basis for Mr. Woods' identification even though that standard is a more rigid one than that which is operative.

Initially, descriptions given to the police was of a perpetrator who was light-skinned and medium built wearing a red and white windbreaker about five feet-nine inches tall.

Elbert Boyd is a good six feet-five if not taller at this point.

The observation that he made of the perpetrator at the time was by his own testimony a brief observation.

That the defendant had his back to him and profile and could only see as a quick second observation the defendant's face while he was in the car.

He changed his testimony at trial with respect to what he believed the height to be but that is after he had already seen Mr. Boyd on at least a couple of occasions.

There was no line-up that was provided for him to attend, either a photographic or corporeal nature but it was only after he had been down in Court after coming down with the family of the deceased admittedly discussing things

concerning this case with him and Lawrence Thomas, the other witness and only after looking inside to the hearing did he indicate to the police his belief that Mr. Boyd was the person who did the shooting.

He had never seen the defendant prior to this incident as contrasted by Mr. Wheatley who knew both the defendant and the deceased.

And I think that Mr. Woods is a well-intended observer who was trying to be of assistance and was glad to be of assistance.

What he observed was a horrible, horrible crime.

A young man's life was taken over a moped.

And that was a crime that was repellent and to be able to be of assistance in convicting an individual the police believed to be the perpetrator of that offense was something that would be viewed as admirable.

But the issue for this Court and really the only issue that makes any sense if we're going to realistically discuss the area of in-Court identifications is whether there's an independent basis for that identification because if we focus only on whether there's a staged confrontation or accidental confrontation, then we don't get to the heart of the issue.

And whether there's an independent basis is the heart of the issue.

The trier of fact has to evaluate the identification insofar as its reliability and if there proceeded an identification that is not reliable because of a confrontation prior to Court that is not independent and is not based on the witness's observations of the incident, itself, then what is going to occur is exactly what occurred in this case.

And that is an individual being identified and then being additionally identified and the basis for the conviction being the identifications.

And the trier of fact ought to be able to consider Mr. Wheatley's identification but Mr. Woods' identification was tainted by the prior confrontation albeit one of an

unintentional but, in this Court's opinion, a grossly negligent confrontation by the lack of attention given by the police department to protecting the witnesses from seeing whether inadvertently, deliberately an individual whom they had not seen under circumstances that the law has determined is fairer such as a line-up or photographic show-up.

In any event --

MR. GUTTER: If you Honor please, could I just interrupt for a moment?

At the risk of encouraging the Court's wrath inasmuch as at the last hearing there was no testimony whether or not there was an independent basis, I'm going to make a request -- and I can

understand your Honor's feeling on this but I feel compelled to make a request --

THE COURT: You can sit down. It would be of absolutely no value.

The only value it would have would be to have one more line on the record where Mr. Woods would point to Mr. Boyd and said, yeah, I'm identifying him because he's the person I saw.

There's no question in the Court's mind and the literature is absolutely replete with the type of psychological dynamic that occurred.

He has been in trial.

He has been here on a number of occasions and he sees Mr. Boyd each time.

It would be a shock and absolutely credulity for him to say anything other than I'm identifying Mr. Boyd because he's the person I saw shoot Elbert Gleeton.

It would be of no value or assistance to the Court.

The only thing of assistance to this Court is testimony that was already offered by Mr. Woods at the time of trial where he gives a description that is absolutely at variance of the reality of Mr. Boyd.

And the testimony at the evidentiary hearing which indicates that prior to any in-Court identification at the time of the trial he made his observations of Mr. Boyd as being the defendant, shared the

observations with the family of the deceased and Lawrence Thomas and then reported to the police, yeah, that is the person I believe is the shooter.

So --

MR. GUTTER: My request would have been to bring him back to see if there was any independent basis.

THE COURT: He has already offered testimony in this regard.

This Court is incorporating all the testimony Mr. Woods has given.

If there's any appellate review of this decision, it would be tragic if the Court of Appeals or Supreme Court didn't also consider the totality of all the

evidence and not focus merely on whether the police staged this prior confrontation or not.

But look to whether or not there's indeed an independent basis.

And the time is long past for Mr. Woods to offer any reliable testimony on that issue.

It's been -- he's been tainted so much by now that, quite frankly, any additional testimony would be merely repetitive and would be of no assistance in any appropriate analysis of this issue.

So the Court will grant the motion to suppress the in-Court identification of the defendant by witness, Clinton

Woods.

MR. ZIEMBA: Okay, you Honor. Thank you, your Honor.

* * *

OPINION OF THE MICHIGAN COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v No. 95220

ELBERT BOYD,

Defendant-Appellee.

BEFORE: D. E. Holbrook, Jr., P. J. and J. H. Shepherd and D. L. Sullivan*, JJ.

PER CURIAM

Plaintiff appeals by leave of this Court from an order of Recorder's Court Judge David P. Kerwin granting defendant's motion to suppress the in-court identification of defendant by witness Clinton Woods. We affirm the order to suppress and remand to the trial court for further proceedings.

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*Circuit judge, sitting on the Court of Appeals by assignment.

The underlying procedural facts may be briefly summarized. Following a waiver of probate jurisdiction, defendant was found guilty of first degree murder and felony firearm after a bench trial before Judge Kerwin. Defendant appealed to this Court as of right. Subsequently this Court granted defendant's motion to remand to allow defendant to move for a new trial on a claim of newly discovered evidence. On remand, the trial court granted defendant a new trial and restored his right to a jury trial. Prior to the second trial, defendant moved to suppress the identification testimony of prosecution witness Woods claiming that the identification procedures employed were unduly suggestive. Following an evidentiary hearing on the matter, Judge Kerwin granted the motion in an opinion from the

bench. It is the grant of this motion which the prosecution appeals.

In the present case, Judge Kerwin found that witness Woods' in-court identification was tainted by a prior inadvertent but improper identification made by Woods at an earlier court proceeding. Judge Kerwin concluded that Woods' identification of defendant was not based upon Woods' brief viewing of the crime as it occurred but rather on the basis of his confrontation with defendant in a juvenile court or at the preliminary examination. The prosecution does not dispute that at one of the prior court proceedings one or more of the other witnesses pointed defendant out to Woods as the perpetrator of the crime and that this was the first occasion Woods had to see the perpetrator after a brief observation of him at the scene of the crime.

The fairness of an identification procedure is evaluated in light of the totality of the circumstances. People v Melvin Davis, 146 Mich App 537, 548; 381 NW2d 759 (1985), citing People v Petrella, 124 Mich App 745; 336 NW2d 761 (1983), aff'd 424 Mich 221 (1985). The test is whether the totality of the circumstances shows it to be reliable. Id. The burden is on the prosecution to prove by fair and convincing evidence that the in-court identification has a sufficient independent basis to purge the taint caused by a prior improper confrontation. People v Lafayette, 138 Mich App 380, 386; 360 NW2d 891 (1984), citing People v Kachar, 400 Mich 78, 97; 252 NW2d 807 (1977). In Kachar, the Supreme Court set forth the factors to be used to determine whether an independent basis exists. These factors include prior relationship with or knowledge of

the defendant, opportunity to observe the offense, length of time between the offense and the disputed identification, accuracy or discrepancies in the pre-lineup or showup description and the defendant's actual description; any previous proper identification or failure to identify the defendant, and any idiosyncratic or special features of the defendant. Id., at 95-96. Accord People v Carter, 415 Mich 558, 598-599; 330 NW2d 314 (1982).

In the instant case, Woods had no prior relationship with or knowledge of defendant and his opportunity to observe the offense was very limited. Woods testified at the first trial that he was sitting on a porch and looked toward the street when he heard someone speak from a moving car in the street to the victim who was on a moped. Woods then looked

away and "didn't pay no more attention to it 'til I heard the gunshot." He then looked back and saw the car drive away. Woods further testified that he did not see the shooter get out of the car but that he did see the shooter "standing but not still." Woods testified that he looked at the shooter the first time for "no more than a quick second" and the second time for "no more than a quick second."

We agree with the trial court that Woods' opportunity to observe the perpetrator was limited. Moreover, we note, as did the trial court, that Woods' initial description of the perpetrator does not closely match that of defendant. According to the trial court defendant "is a good 6'5" if not taller." Woods initially described the perpetrator as 5'9" tall. There was no lineup for this

witness and no identification or failure to identify defendant prior to the disputed confrontation at the pre-trial proceedings.

Summing up the above factors and applying the totality of the circumstances test for reliability, we cannot conclude that the trial court erred in concluding that Woods did not have an independent basis for his identification of defendant which would purge the taint of the suspect pretrial identification of the defendant. Furthermore, the trial court felt that Woods, by traveling to all court proceedings with the family of the deceased, was "if not deliberately . . . then certainly inadvertently influenced by them" since the family was "absolutely convinced that the police had the right person."

The prosecution, relying on People v Yacks, 49 Mich App 444; 212 NW2d 249 (1973), lv den 400 Mich 8421 (1977), and People v Hampton, 52 Mich App 71; 216 NW2d 441 (1974), rev'd on other grds 394 Mich 437 (1975), argues that since the sighting of defendant by Woods in the hallway was inadvertent and not due to any arranged identification procedures, Woods' identification of defendant should not be suppressed. We do not view the cases cited by the prosecution as dispositive. In Yacks, this Court examined whether an inadvertent pretrial courtroom confrontation "was impermissibly suggestive and whether it alone would lead to a likelihood of irreparable misidentification." Id., 449. Implicit in the court's analysis of the issue was the assumption that there must be a basis for identification

independent of an earlier suspect identification even if the earlier confrontation was inadvertent. Similarly, in Hampton, this Court found that an in-court identification had sufficient independent basis to withstand an "inadvertent pre-trial confrontation." Id., at 77. The cases cited by plaintiff do not conflict with the test of viewing the totality of the circumstances for reliability.

Accordingly, we affirm the trial court's pretrial order suppressing the witness's identification of defendant and remand for further proceedings. We do not retain jurisdiction.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ John H. Shepherd
/s/ Daniel L. Sullivan

ORDER OF THE MICHIGAN COURT OF APPEALS

Court of Appeals, State of Michigan

ORDER

PEOPLE v ELBERT BOYD

Docket # 95220 — Donald E. Holbrook, Jr. Presiding Judge

L.C. # 84-05093 — John H. Shepherd, Daniel L. Sullivan, Judges

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The Court orders that the motion for rehearing is DENIED.

A true copy entered and certified by Ronald. L. Dzierbick, Chief Clerk, on

August 3, 1988 /s/Ronald L. Dzierbicki
Chief Clerk

MICHIGAN SUPREME COURT
Lansing, Michigan

Dorothy Comstock Riley
Chief Justice

Charles L. Levin
James H. Brickley
Michael F. Cavanagh
Patricial J. Boyle
Dennis W. Archer
Robert P. Griffin
Associate Justices

ORDER
Entered: December 19, 1988

83935

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

SC: 83935
COA: 95220
LC: 84-050937

-v-

ELBERT BOYD,

Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded

that the question presented should be reviewed by this Court.

Brickley and Boyle, JJ., dissent and state as follows:

We would grant leave to appeal to decide the issue of jurisprudential significance in this case, namely, whether, in the absence of government action, due process requires the suppression of identification testimony that is the product of an earlier suggestive confrontation or whether the factfinder should be allowed to hear all the circumstances and determine the reliability of the testimony.

Riley, C.J., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

December 19, 1988

/s/Corbin R. Davis
Clerk

Supreme Court, U.S.
FILED
APR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1298

In The

Supreme Court of the United States

October Term, 1988

THE STATE OF MICHIGAN,
Petitioner,

v.

ELBERT BOYD,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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COUNTER QUESTION PRESENTED

WHEN A STATE APPELLATE DECISION RESTS ON AN ADEQUATE FOUNDATION OF STATE SUBSTANTIVE LAW DOES THE PRINCIPLE OF FEDERALISM RENDER THE STATE DECISION IMMUNE FROM REVIEW ON CERTIORARI?

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No. 88-1298

In The

Supreme Court of the United States

October Term, 1988

THE STATE OF MICHIGAN,

Petitioner,

v.

ELBERT BOYD,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

Elbert Boyd, respondent, by his attorney, Carl Ziemba, makes the following Response to Petition for a Writ of Certiorari and prays this Court deny same.

OPINIONS BELOW

The Opinion of the Michigan Court of Appeals which is the center of controversy here and the Order of the Michigan Supreme Court denying leave to appeal to the State of Michigan have been printed in Petitioner's Appendix to Petition for a Writ of Certiorari and perhaps need not be set forth here.

STATEMENT OF JURISDICTION

Petitioner claims that the jurisdiction of this Court is invoked under *28 USC 1257(3)* which reads as follows:

> 'By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to

> the Constitution, treaties of laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.'

Petitioner claims that the Fifth, Sixth and Fourteenth Amendments to the United States Constitution were implicated in the judgment of the Michigan Court of Appeals because a 'right, privilege or immunity is specially set up or claimed under the Constitution'.

Respondent challenges the claim of the Petitioner that the United States Constitution is implicated in the judgment of the Michigan Court of Appeals and asserts, rather, that the judgment of the Michigan Court of Appeals rests on an adequate foundation of state substantive law and that it is immune from review on certiorari upon principles of federalism.

CONSTITUTIONAL PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

After respondent was convicted of murder of the first degree in a bench trial, he was granted a new trial on grounds which are not in issue here. In preparation for his second trial, respondent filed a pre-trial motion seeking the suppression of the anticipated in-court identification of respondent by one Clinton Woods on the bases that a highly suggestive confrontation between Woods and respondent had a tendency to lead to an irreparable mistaken identification and that

Woods did not have a source of identification independent of the suggestive confrontation.

After conducting an evidentiary hearing on respondent's said motion, the trial court granted the motion and ordered the suppression of the anticipated in-court identification of respondent by Woods.

The testimony adduced on the evidentiary hearing reflected a conflict between the officer in charge of the case and Woods as to the occasion upon which the confrontation in question occurred: the officer testified that it occurred at preliminary examination and Woods testified that it occurred during a juvenile court hearing which preceded the preliminary examination. However, the officer and Woods agreed in their individual testimony that a confrontation in a court room during a judicial proceeding in the prosecution of respondent had occurred between Woods and respondent, and their individual testimony agreed generally on the circumstances of the confrontation:

The officer had invited or instructed Woods to come to court on the occasion in question; whether Woods had been subpoenaed was not clear. Woods was driven to the court house by the parents of the deceased victim. Woods was not sequestered by the police or the prosecutor upon his arrival at the court house; he was allowed to roam freely in the hallway outside the court room in which proceedings against respondent were being conducted. Other witnesses told Woods that respondent 'is him', and Woods 'went back down out of curiosity to see who they was pointing to'. The officer wasn't sure that Woods would be called to testify because the prosecution 'had one good, strong witness' and Woods 'was a so-so witness' and the officer 'was not sure just what Clinton Woods would be able to tell me nor how he would testify'. Woods testified that he

had never seen respondent prior to the moment of the shooting which resulted in the death of the deceased, and the Michigan Court of Appeals found that according to Woods' testimony on the first trial, 'Woods testified that he looked at the shooter the first time for "no more than a quick second" and the second time for "no more than a quick second"' [Petition for Certiorari, 28a-29a].

The Michigan Court of Appeals granted the State of Michigan leave to file an interlocutory appeal from the order of the trial court granting respondent's motion to suppress the anticipated in-court identification of respondent by Woods. In his brief to the Michigan Court of Appeals, respondent claimed that his right to counsel had been violated under the Sixth Amendment to the United States Constitution *and* under Section 20, Article 1, Michigan Constitution 1963; and respondent claimed that his right to due process was violated under the Fourteenth Amendment to the United States Constitution *and* under Section 17, Article 1, Michigan Constitution 1963. Basically, respondent argued to the Michigan Court of Appeals that the State of Michigan was responsible for the occurrence of the highly suggestive confrontation between respondent and Woods and that Woods did not have a basis or source for his identification of respondent independent of the suggestive confrontation.

REASONS FOR DENYING THE WRIT

Simply put, this Court has no jurisdictional basis for reviewing the judgment of the Michigan Court of Appeals.

Nowhere in its opinion does the Michigan Court of Appeals even mention any provision of the United

States Constitution; nor does the Michigan Court of Appeals indicate or intimate that it was predicating its opinion and judgment on any provision of the United States Constitution; nor does the Michigan Court of Appeals cite any federal case or opinion of this Court as authority in its opinion.

The basis for the opinion and judgment of the Michigan Court of Appeals was that the totality of the circumstances indicated that the anticipated in-court identification of respondent by Woods was not reliable. In its opinion, the Michigan Court of Appeals said:

> 'The fairness of an identification procedure is evaluated in light of the totality of the circumstances. [citation of two Michigan appellate cases]. The test is whether the totality of the circumstances shows it to be reliable. *Id.* The burden is on the prosecution to prove by fair and convincing evidence that the in-court identification has a sufficient independent basis to purge the taint caused by a prior improper confrontation. [citation of two Michigan appellate cases]. In *Kachar* [*People* v *Kachar*, 400 Mich 78, 97 (1977)], the Supreme Court set forth the factors to be used to determine whether an independent basis exists. . . .' [Petition for Certiorari, 27a]

In *Kachar, supra*, the Michigan Supreme Court stated in connection with the problem of in-court identification as follows:

> 'The problem becomes, then, what factors may have a bearing upon the true basis of the witness's in-court identification to prove that the courtroom identification is not the fruit of the suspect pre-trial identication. *We have not*

> *before today set forth the principles on which such decisions should be based.*
>
> * * *
>
> 'The *Wade* [*United States* v *Wade*, 388 US 218 (1967) criteria, however, are suggestions only, neither exclusive nor inclusive, *and we are not limited by them in designating relevant factors to be considered by our own courts.*' 400 Mich 78, 93-94 (1977) [emphases added; footnote omitted].

Thus, it is clear that the Michigan Supreme Court in *People* v *Kachar, supra,* was setting criteria for Michigan courts to follow as substantive Michigan law while looking to the opinions of this Court and other federal courts for guidance. Nowhere in *Kachar* did the Michigan Supreme Court invoke the federal constitution as basis for its decision.

Thus, in its opinion in the case at bench, the Michigan Court of Appeals, by citing *People* v *Kachar, supra,* was invoking Michigan substantive law.

In its opinion in the case at bench, the Michigan Court of Appeals *without any citation of authority and certainly without any reference to the federal constitution* approved the finding of the trial court 'that the witness Woods' in-court identification was tainted by a prior inadvertent but improper identification made by Woods at an earlier court proceeding' [Petition for Certiorari, 26a].

Whatever one might think about the methods employed by the Michigan Court of Appeals in reaching its approval of the finding of the trial court that the in-court identification of respondent by Woods was tainted by an improper confrontation, the fact remains that the Michigan Court of Appeals did not find that respond-

ent's rights under the federal constitution were violated nor did the Michigan Court of Appeals predicate its holding on the proposition that any of respondent's rights under the federal constitution had been violated.

Thus, there is no jurisdictional basis for review by this Court of the judgment of the Michigan Court of Appeals in the case at bench. In *Wainwright* v *Sykes*, 433 US 72, 81 (1977) this Court stated that 'it is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts', and the Court cited *Fox Film Corp* v *Muller*, 296 US 207 (1935) and *Murdock* v *Memphis*, 20 Wall 590, 22 L Ed 429 (1875).

In *Fox Film Corporation* v *Muller, supra*, this Court said:

> '[T]he settled rule [is] that where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.' *Id*, at 210.

In the case at bench, the principle of *Fox* applies more forcibly because there is not extant in the opinion of the Michigan Court of Appeals any federal grounds for the opinion; the opinion of the Michigan Court of Appeals is grounded solely on Michigan substantive law.

CONCLUSION

Respondent respectfully prays this Court deny the Petition for Certiorari filed in this case.

Respectfully submitted,

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Dated: April 13, 1989